

BARBARA ROWELL
Claimant

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Can the Appeals Board take judicial notice of unemployment records not presented to the Administrative Law Judge, but instead attached to claimant's brief to the Appeals Board?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Attached to claimant's May 14, 1999, letter brief to the Appeals Board is a Kansas Department of Human Resources K-BEN 4211 form dealing with claimant's entitlement to unemployment insurance benefits. Claimant requests that the Appeals Board take judicial notice of this document for purposes of the workers' compensation litigation.

This information was not provided to the Administrative Law Judge at the time of regular hearing. K.S.A. 1998 Supp. 44-555c(a) requires review by the board upon questions of law and fact as presented to the administrative law judge. As this evidence was not presented to the Administrative Law Judge at the time of the regular hearing, it cannot now be considered by the Appeals Board absent a stipulation by the parties allowing this information into the record. There is no such stipulation. Therefore, claimant's request to admit certain unemployment records is denied.

Claimant worked for respondent in an adult care facility as a CNA beginning in April 1997. Claimant's duties required substantial hand-intensive activities, including regularly dealing with patients, transferring patients from beds to wheelchairs and back again, bathing patients, lifting them in and out of shower chairs, and changing bedding.

In October 1997, claimant awoke one morning experiencing difficulty with her right arm, which she said she could not move. She initially sought treatment with Dr. Souther, her personal physician, on October 23, 1997, for right wrist pain. She advised respondent of the work-related connection to the wrist and was referred to Dr. Michael P. Estivo, an orthopedic surgeon. Dr. Estivo first saw claimant on November 19, 1997, at which time she displayed a positive Tinel's and Phalen's at the right wrist, and decreased sensation over the first through third digits of the right hand. By December 3, 1997, claimant's symptoms also included the left wrist, although the right wrist was the more severe. Dr. Estivo diagnosed claimant with bilateral wrist pain and bilateral carpal tunnel syndrome. A nerve conduction study was performed on December 8, 1997, which was interpreted as negative or normal. Dr. Estivo noted that false negatives were not uncommon with regard to nerve conduction studies and carpal tunnel syndrome. He estimated that up to 25 percent of the negative EMG/NCTs were what he would describe as false negatives. Claimant's report of paresthesia, pain and numbness in the first three digits of the hand, as well as the positive Tinel's and Phalen's tests, overrode the negative nerve conduction test results in Dr. Estivo's opinion.

Claimant underwent left carpal tunnel surgery on January 19, 1998, and did well postoperatively. She underwent right carpal tunnel release on March 2, 1998, and again

reported improvement after the surgery. Claimant's last date of employment prior to the surgery was January 14, 1998. Claimant again saw Dr. Estivo on March 16, 1998, at which time she was showing continued improvement. He recommended that she go through physical therapy and work hardening, with both programs beginning in March 1998. Claimant, however, did not finish either of the programs and did not appear at Dr. Estivo's office for the follow up visit on March 31, 1998. At some time after the March 16 examination, claimant moved from Wichita, Kansas, to Missouri to be with her new grandchild. Claimant testified at one time she left Wichita in March but at another time said that she left as late as April 26, 1998.

On May 5, 1998, while in Missouri, claimant was referred by respondent to Dr. Charles C. Mauldin, Jr., a board certified emergency medicine, physical medicine, rehabilitation and electrodiagnostic medicine specialist. At that time, Dr. Mauldin found nonlocalizing dullness to pinprick, giveaway weakness, grip measurements which he considered to be excessively variable and other nonorganic or nonphysiological signs which he felt to be unusual or abnormal. He found claimant to require no additional treatment and placed no work restrictions or limitations on her from the bilateral carpal tunnel surgeries. He opined that, based upon the normal nerve conduction studies and his examination, he did not believe claimant had carpal tunnel syndrome and did not believe that the symptomatology she displayed was related to her employment. In his experience, he found only about 5 percent of the negative NCTs proved to be false. He also stated that, if claimant awoke with wrist pain for the first time one morning, it would not be possible for that wrist pain to be representative of a work-related carpal tunnel syndrome. The medical records provided to Dr. Mauldin indicated that claimant missed numerous physical therapy sessions which he felt to be inappropriate under the circumstances.

In reviewing the job task analysis provided regarding claimant's 15-year history of employment, he felt claimant would be capable of performing all the job tasks as, in his opinion, she had no restrictions or limitations as of his May 5, 1998, examination.

After being released to employment by Dr. Mauldin, claimant returned to Wichita, Kansas. Claimant testified that she attempted to contact the director of nursing with respondent and, after several attempts, finally had the opportunity to discuss her possible reemployment with this director of nursing. She was advised by the director of nursing that there was a conflict of interest involved and claimant would not be returning to work with respondent.

Respondent deposed Jeannie Keller, the Human Resources Director. Claimant and Ms. Keller had never met as Ms. Keller did not begin in that position until March 11, 1998, approximately two months after claimant left her employment with respondent to undergo the bilateral carpal tunnel surgeries. Ms. Keller was never contacted by claimant regarding the possibility of reemployment. She did report that it was respondent's policy to accommodate employees when they have suffered work-related injuries. She advised that,

if claimant returned to work with respondent, an accommodated job would be provided for her. Ms. Keller acknowledged that she did not, at any time, talk to the director of nursing regarding claimant's alleged contacts. She admitted respondent never offered claimant an accommodated position. However, such a position would have been available had claimant attempted to return to work with respondent.

Claimant was referred to Dr. Pedro Murati by claimant's attorney. He examined claimant on one occasion, June 4, 1998. At that time, he agreed that the nerve conduction studies that were done on claimant were normal, but the doctor indicated that the study was incomplete and that, in one respect, the latency of the median sensory nerve on the right side at 3.6 could be considered abnormal. He agreed with the diagnosis of bilateral carpal tunnel syndrome and further agreed that surgery to relieve claimant's symptoms was necessary. He rated claimant at 10 percent functional impairment to each hand using the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He opined that claimant's functional impairment was attributable to the work activities performed with respondent. He limited claimant to no heavy grasping, no frequent repetitive hand controls and no frequent repetitive grasping. He opined that claimant limit herself to 35 pounds occasional lifting and carrying, with 20 pounds frequent and 10 pounds constant. The same weight limits would apply to pushing and pulling. He recommended claimant not use hooks or knives or vibratory tools, and not use any heavy grasping tools. He found no indication of any abnormal activities on claimant's part, and found no malingering or exaggerating during his examination of claimant. In reviewing the claimant's history, he felt that the arm posture in sleep may incite symptoms, but also felt that the night numbness and awakening were clearly symptoms of ongoing carpal tunnel syndrome, and that the onset of symptoms would relate to claimant's employment with respondent.

In reviewing the tasks list provided, he said that claimant was restricted from performing thirteen of those twenty-seven tasks listed, for a 48 percent loss of task performing ability. He felt at the time of his examination that claimant had reached maximum medical improvement.

After attempting to return to work with respondent, claimant filed for and was granted unemployment benefits. Claimant testified that, while on unemployment, she made numerous contacts with other employers attempting to obtain employment all over Wichita. She applied at various nursing homes, but was unable to obtain a job. She has also applied with other employers for positions such as salesclerk, and has filled out applications at many places. She has not, however, had the opportunity for a second interview with any of these employers and had not, at the time of regular hearing, been hired.

In the Award, the Administrative Law Judge considered claimant's limited attempts at obtaining employment from respondent to be insufficient and, citing Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___

(1998), found that claimant should be limited to her functional impairment only, as respondent would have accommodated claimant's restrictions had she made sufficient effort to contact them after her surgeries.

The Administrative Law Judge awarded claimant a 12 percent functional impairment to the body as a whole, stating in the Award that the opinions of both Dr. Murati and Dr. Estivo gave claimant a 10 percent impairment to each upper arm, which converts to a 12 percent whole body impairment. However, a review of Dr. Estivo's deposition uncovers no such opinion. When Dr. Estivo was asked if he had considered a functional impairment rating on claimant, he advised he had not been asked to offer an opinion and he had not done so. In fact, claimant had failed to appear for his follow up examination, so as of the last time Dr. Estivo examined claimant, she had not reached maximum medical improvement. The only impairment opinions in the record are those of Dr. Murati at 12 percent to the body and Dr. Mauldin who found claimant to have no functional impairment as a result of the injuries suffered with respondent.

In reviewing the medical evidence, the Appeals Board finds claimant does have a 12 percent whole body functional impairment based upon the opinion of Dr. Murati. The Appeals Board does not find Dr. Mauldin's opinion that claimant has no functional impairment after undergoing bilateral carpal tunnel surgeries to be credible.

The Appeals Board further finds Dr. Mauldin's opinion that claimant has no restrictions of any kind after undergoing bilateral carpal tunnel surgery to lack credibility. The only credible opinion regarding claimant's work disability, therefore, would be that of Dr. Murati. In reviewing the tasks list provided, Dr. Murati felt claimant capable of performing 52 percent of the tasks on the list which results in a 48 percent loss of task performing ability. The Appeals Board finds that Dr. Murati's opinion regarding claimant's task loss is appropriate and is adopted for purposes of this Award.

After returning to Wichita and after being unable to obtain reemployment with respondent, claimant sought and was provided unemployment benefits. During her unemployment period, claimant made numerous contacts at various employers around Wichita in an attempt to obtain employment, but was unsuccessful as of the regular hearing in obtaining this employment. The Appeals Board, in considering the principles set forth in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), does not find that claimant refused any work and never received any type of a proffered job from respondent. In fact, claimant is the only party who made any attempt at getting claimant and respondent back together in an employment relationship. Respondent, although expressing a willingness to do so, apparently made no attempt to return claimant to work.

The Appeals Board further finds claimant not in violation of the principles set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), in that

claimant has not failed to make a good faith effort to obtain post-injury employment. The attempts made by claimant appeared to involve several contacts per week over a many-week period with various employers around the Wichita area. Therefore, claimant should not be restricted to a functional impairment, but is instead entitled to a work disability. As claimant has put forth a good faith effort to obtain employment, she would be entitled to a 100 percent wage loss under K.S.A. 1996 Supp. 44-510e until such time as she is able to obtain employment. In considering the task loss and the wage loss suffered by claimant, the Appeals Board finds claimant has suffered a 74 percent permanent partial work disability under K.S.A. 1996 Supp. 44-510e. In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated April 2, 1999, should be, and is hereby, modified, and an award is granted in favor of the claimant, Barbara Rowell, and against the respondent, Terrace Gardens Retirement Center, and its insurance carrier, Travelers Indemnity of Illinois, for an injury occurring through January 14, 1998, and based upon an average weekly wage of \$412.55, for a 74 percent permanent partial disability to the body as a whole.

Claimant is entitled to 9.41 weeks of temporary total disability compensation at the rate of \$275.04 per week totaling \$2,588.41, followed by 307.10 weeks of permanent partial disability compensation at the rate of \$275.04 per week totaling \$84,464.78, for a total award of \$87,053.19.

As of September 20, 1999, claimant would be entitled to 9.41 weeks temporary total disability compensation at the rate of \$275.04 per week totaling \$2,588.41, followed by 78.3 weeks of permanent partial disability compensation at the rate of \$275.04 per week totaling \$21,535.63, for a total due and owing of \$24,124.04, minus any amounts previously paid. Thereafter, claimant is entitled to 228.8 weeks of permanent partial disability compensation at the rate of \$275.04 per week totaling \$62,929.15 until fully paid or until further order of the director.

In all other regards, the Award of the Administrative Law Judge entitling claimant to outstanding medical, unauthorized medical up to the statutory limit, and future medical upon proper application to the director are affirmed.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Ireland Court Reporting Transcript of Preliminary Hearing	Unknown
Barber & Associates Transcript of Regular Hearing	\$165.10
Deposition Services Deposition of Pedro A. Murati, M.D.	\$221.20
Transcript of continuation of regular hearing by deposition	\$266.00
Deposition of Michael P. Estivo, D.O.	\$220.20
Kelley, York & Associates Deposition of Jeannie Keller	\$139.00
Bannon & Associates Deposition of Charles C. Mauldin, Jr., M.D.	\$309.15

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
William L. Townsley, III, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director